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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. AB 1043 (Sub-No. 1)**

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**MONTREAL, MAINE & ATLANTIC RY., LTD.  
-DISCONTINUANCE OF SERVICE AND ABANDONMENT-  
IN AROOSTOOK AND PENOBSCOT COUNTIES, MAINE**

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**COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY**

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Dated: August 3, 2010

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**COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY**

Pursuant to the Decision issued in the above-captioned proceeding on July 20, 2010 (the “*July 20 Decision*”), Canadian Pacific Railway Company (“CP”) respectfully submits these comments addressing two jurisdictional questions posed by the Board: (1) “whether the provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904 would support the imposition of conditions in this case requiring access of any sort (including trackage rights and haulage rights)” in connection with an Offer of Financial Assistance (“OFA”) filed by the State of Maine, and (2) “[the Board’s] authority to order [such] access over a carrier’s lines into a foreign country.” *Jul 20 Decision* at 3.<sup>1</sup> As CP’s Comments demonstrate, the unambiguous language of 49 U.S.C. § 10501, and longstanding court and agency precedent, make clear that the Board has no jurisdiction to grant trackage rights or any type of access over rail lines located in Canada. Moreover, the statutory language of 49 U.S.C. §§ 10903 and 10904, and judicial and STB/ICC decisions interpreting those provisions, establish that the Board does not have authority to

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<sup>1</sup> CP takes no position with respect to the merits of the abandonment application filed by Montreal, Maine & Atlantic Railway, Ltd. (“MM&A”), or the OFA submitted by the State of Maine, in this proceeding. Nor does CP take any position as to whether (assuming *arguendo* the Board had jurisdiction to impose ancillary access rights in connection with an OFA) the facts and circumstances would warrant such relief in this proceeding.

impose trackage rights or access conditions in connection with an OFA filed in response to a Section 10903 abandonment application.<sup>2</sup>

# **I. THE BOARD'S JURISDICTION DOES NOT EXTEND TO RAIL LINES IN CANADA OR MEXICO.**

Even if the Board had authority generally to impose trackage rights or other access conditions in connection with abandonment and/or OFA proceedings – and, as CP demonstrates in Part II below, it does not – it is clear that the Board has no jurisdiction whatsoever to grant such rights over railroad lines located in Canada or Mexico. The scope of the Board's jurisdiction over cross-border rail transportation is set forth at 49 U.S.C. § 10501(a)(2):

Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in . . . the United States and a place in a foreign country.”  
(Emphasis added)<sup>3</sup>

There is nothing ambiguous about this geographic limitation on the Board's jurisdiction. As the Supreme Court observed in *United States v. Penn. R.R. Co.*, 323 U.S. 612, 621 (1945), “whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad, it had, by the limiting provisions . . . expressed its purpose not to empower the [ICC] with general authority to regulate rail transportation in foreign countries.” Consistent with the unequivocal language and history of the statute, both the courts and this agency have held, in

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<sup>2</sup> CP is also a member of, and joins in the Comments submitted by, the Association of American Railroads.

<sup>3</sup> Predecessors to current Section 10501(a)(2) confirm Congress' unequivocal intent that the geographic scope of the agency's jurisdiction be limited to rail transportation within the United States. For example, the Transportation Act of 1920 conferred on the former ICC jurisdiction over rail transportation “only in so far as such transportation . . . takes place within the United States.” Transportation Act of 1920, § 400(1), 41 Stat. 474 (originally codified at 49 U.S.C. § 1(1)). Likewise, the 1978 recodification of the Interstate Commerce Act (the immediate predecessor to Section 10501(a)(2)) stated that “(a) . . . the Interstate Commerce Commission has jurisdiction over transportation – (2) to . . . the extent the transportation is in the United States. . . .” Pub. L. No. 95-473, § 10501(a)(2), 92 Stat. 1359 (Oct. 17, 1978).

a variety of contexts, that the STB/ICC lacks jurisdiction over railroad lines located in Canada or Mexico, or rail transportation performed in those countries.

For example, longstanding Supreme Court precedent establishes that, while the Board possesses authority to consider the reasonableness of a cross-border joint through rate, it has no jurisdiction to prescribe a rate for transportation over lines in a foreign country or to order a foreign carrier to pay reparations. *See, e.g., Canada Packers Ltd. v. Atchison, Topeka & Santa Fe Ry. Co.*, 385 U.S. 181, 182-83 (1966); *News-Syndicate Co. v. N.Y. Cent. R.R. Co.*, 275 U.S. 179, 187 (1927); *Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 232-33 (1925). As the Court explained in *News-Syndicate* (at 187):

That the rate for through transportation from a point in Canada to a point in the United States is published as a joint through rate, rather than as separate charges for the portions of the transportation on both sides of the international boundary, does not operate to extend the Commission's jurisdiction. The Commission would not have jurisdiction of [the] through rate if portion for Canadian part of transportation were separately published." (Emphasis added)

Similarly, the ICC has long recognized that its ratemaking jurisdiction with respect to cross-border traffic is limited "to the extent of its movement within the United States." *C. S. Emery & Co. v. Boston & Me. R.R. Co.* 38 I.C.C. 636, 637 (1916). Specifically, "the [ICC] has repeatedly held that it has 'no jurisdiction to prescribe international rates for application partly in Canada.'" *Canadian Pac. Ltd. v. United States*, 379 F. Supp. 128, 132 (D.C. Dist. 1974) (quoting *Thermoid Co. v. B&O R. Co.*, 303 I.C.C. 743, 752 (1958)). In promulgating regulations governing the publication of joint through rates for cross-border shipments, the ICC explained that "Canadian or Mexican carriers file with us, if they so desire, the tariffs establishing joint rates with our domestic carriers, and we do not thereby obtain jurisdiction over those foreign carriers." *Int'l Joint Rates and Through Rates*, 337 I.C.C. 625, 635 n.11 (1970).

Both the STB and the ICC before it have likewise acknowledged that the agency has no jurisdiction to authorize the ownership or use of railroad lines located beyond the borders of the United States. In *Kansas City Southern—Control—KCS. Ry. Co., Gateway E. Ry. Co., Tex. Mexican Ry. Co.*, STB Fin. Docket No. 34342, Decision No. 2 (June 9, 2003) (“*KCS/Tex-Mex*”), the Board classified the control transaction as minor even though “the broader transaction, incorporating the related KCS/TFM component [*i.e.*, the acquisition of Mexico’s largest railroad, TFM, by Kansas City Southern], could be very significant.” *KCS/Tex-Mex* at 10. The Board stated: “Indeed, if the KCS/TFM transaction were subject to the jurisdiction of the Board—which it is not—it would be categorized as a “major” transaction because TFM’s size would make it a Class I railroad if it were in the U.S.” *Id.* (emphasis added).

*Canadian Pac. Ltd., Canadian Pac. Ry. Co. and Napierville Jct. R.R. Co.—Corporate Family Transaction Exemption—St. Lawrence & Hudson Ry. Co.*, STB Fin. Docket No. 33136, 61 Fed. Reg. 52994 (Oct. 9, 1996) (“*St. Lawrence & Hudson*”) involved an intra-corporate family transaction pursuant to which CP transferred to the St. Lawrence & Hudson Railway Company CP’s ownership interests in certain rail properties, including the Detroit River Tunnel connecting Detroit, MI and Windsor, ONT, and the Suspension Bridge connecting Niagara Falls, NY with Niagara Falls, ONT. The Board’s notice in that proceeding carefully limited the scope of the exemption to encompass only those rail lines (including portions of the tunnel and bridge spanning the US-Canada border) that were located within the United States. *Id.* This limitation on the geographic scope of the exemption in *St. Lawrence & Hudson* was consistent with longstanding ICC precedent *Int’l-Great N. R.R. Co. Trustee Trackage Rights*, 275 I.C.C. 27, 28 (1949), where the agency’s approval of trackage rights over the Laredo Bridge connecting

Laredo, TX with Mexico was limited to the track north of the international boundary at the center of the bridge.

The limitation on the Board's jurisdiction to transportation within the United States has also been recognized in the context of a carrier's obligation to provide rail cars. In *St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation Dist.*, 304 U.S. 295 (1938), the Supreme Court reversed a Fifth Circuit decision that required a U.S. carrier to provide cars for transportation from the Port of Brownsville, TX to Matamoros, Mexico (and subsequent reloading at Matamoros). In doing so, the Court held that "[t]he Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico." 304 U.S. at 300. The Court's ruling confirms that the STB has no jurisdiction to enforce the common carrier obligation extraterritorially.

Finally, both the courts and the ICC have held that the agency's statutory obligation to impose labor protective conditions in connection with certain types of proceedings (including line abandonments) does not authorize the Board to impose "extraterritorial" protective conditions for the benefit of non-U.S. employees. In *Great N. Pac. & Burlington Lines, Inc.—Merger—Great N. Ry.* ("Matter of Van Blaricom"), 6 I.C.C.2d 919 (1990), the ICC held that it had no authority to impose labor protective conditions on behalf of foreign employees of an American carrier. 6 I.C.C. 2d at 924. In doing so, the Board squarely rejected the notion that its jurisdiction over the applicant carrier (BN) provided a basis for it to extend labor protective conditions imposed in a merger proceeding to that carrier's Canadian employees. Finding "nothing on the face of the statute evincing a congressional intent to extend the reach of the statute to employees in foreign countries" (*id.* at 925), the ICC concluded that:

Given the overall judicial (and presumably Congressional) intent not to interfere with the laws of other countries, and the judicial precedent that a clear statement of extraterritorial intent be present, we are not persuaded on this record that employees of American railroads in other countries are covered by § 11347 of the statute [the predecessor to § 11326].

*Id.* The Court of Appeals for the Ninth Circuit affirmed the ICC's interpretation of the scope of its jurisdiction, holding that:

The presumption against extraterritoriality, in conjunction with Congress' specific language in §10501 limiting the jurisdiction of the ICC to transportation 'in the United States,' compels the conclusion that the ICC does not have the authority to enforce the labor protective conditions extraterritorially."

*Van Blaricom v. Burlington N. R.R. Co.*, 17 F.3d 1224, 1227 (1994) (emphasis added).

Consistent with *Van Blaricom*, the STB has never extended its customary labor protective conditions to non-U.S. employees in connection with rail consolidation proceedings. *See, e.g., Canadian Pacific Ry. Co.—Dakota, Minn. & E. R.R. Corp.*, STB Fin. Docket No. 35081. Decision No. 11, at 8 (Sept. 30, 2008), *aff'd sub nom. Commuter Rail Div. of Regional Transp. Auth. v. STB*, 2010 WL 2363214 (D.C. Cir. June 15, 2010); *Canadian Nat'l Ry. Co.—Control—Ill. Cent. R.R. Co.*, 4 S.T.B. 122, 164-65 (1999)

The foregoing precedents leave no doubt that any jurisdiction that the Board might otherwise possess to impose trackage rights or similar access conditions in connection with an abandonment proceeding under 49 U.S.C. § 10903 or an OFA filed pursuant to 49 U.S.C. § 10904 does not encompass authority to grant such rights with respect to a rail line that is located beyond the borders of the United States. Section 10501(a)(2) expressly limits the territorial scope of the Board's powers "only to transportation in the United States." 49 U.S.C. § 10501(a)(2)(emphasis added). Neither Section 10903 nor Section 10904 remotely suggests –

much less contains a clear expression of – any intent on the part of Congress to authorize the Board to apply those statutes extraterritorially. Moreover, the courts and the STB/ICC have repeatedly held, in cases involving nearly every aspect of the Board’s regulatory powers under the Interstate Commerce Act, that the agency does not have authority to regulate rail carriers, railroad lines or rail transportation in a foreign country. Accordingly, CP respectfully submits that the Board does not have jurisdiction to grant the State of Maine’s request for ancillary trackage rights or haulage rights, to the extent that the request involves MM&A’s line of railroad extending from the United States-Canada border in the vicinity of Van Buren, ME to a point of connection with the lines of Canadian National Railway Company in the vicinity of St. Leonard, NB.

**II. THE INTERSTATE COMMERCE ACT DOES NOT GIVE THE BOARD AUTHORITY TO GRANT ANCILLARY TRackage RIGHTS OR ACCESS OVER ADDITIONAL LINES IN CONNECTION WITH AN ABANDONMENT OR OFFER OF FINANCIAL ASSISTANCE.**

The *July 20 Decision* (at 3) requested comments from interested parties on “whether provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904 would support the imposition of conditions in this case requiring access of any sort, including trackage rights and haulage rights,” over segments of MM&A track that are not included in its abandonment application. As Part I above demonstrates, the Board clearly has no jurisdiction to impose such conditions with respect to MM&A’s rail lines in Canada. Moreover, the Interstate Commerce Act does not contain any jurisdictional basis for the Board to grant such ancillary rights as a “condition” to approval of either a rail line abandonment or discontinuance (under 49 U.S.C. § 10903) or an OFA (pursuant to 49 U.S.C. § 10904). Unlike 49 U.S.C. § 10907(d), which explicitly authorizes the Board to grant ancillary trackage rights in connection with a “feeder line” application, neither Section 10903 nor Section 10904 confers any such authority. The Board and the ICC have long

recognized that Congress' decision not to include similar authority in Section 10904 means that the agency lacks jurisdiction to grant an OFA purchaser trackage rights over lines that are not part of the OFA.

It is well established that the Board "has no general power to require a carrier to grant another carrier the right to use its lines. Rather, our authority to compel trackage rights arises out of specific provisions of the Interstate Commerce Act." *Delaware & Hudson Ry. Co. – Discontinuance of Trackage Rights Exemption—in Susquehanna Cty., PA et al.*, STB Docket No. AB-156 (Sub-No. 25X) (Mar. 30, 2005).<sup>4</sup> Various provisions of the Interstate Commerce Act do authorize the Board to grant one carrier the right to operate over another carrier's lines in certain specific circumstances. For example, the Board's power to impose trackage rights or other access conditions in connection with merger or control transactions derives from the explicit language of 49 U.S.C. § 11324(c).<sup>5</sup> Where a service failure or unauthorized cessation of rail service occurs, the Board may grant a carrier the right to operate over the affected lines of another railroad for a limited time (270 days) in order to address such emergency. 49 U.S.C. § 11123.

Likewise, 49 U.S.C. § 10907(d) expressly provides that, in connection with a feeder line application:

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<sup>4</sup> See also *Chicago & N.W. Transp. Co.—Construction and Operation Exemption—City of Superior, Douglas Cty., WI*, ICC Fin. Docket No. 32433, 1995 WL 785318, at \*2 (Dec. 28, 1995) ("Congress has left, except in certain specifically defined areas, the use of one carrier's tracks by another up to the voluntary agreement of the carriers, subject to Commission approval"); cf. *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 309 (1954) (ICC did not have authority to initiate railroad consolidation because such power was not provided by Interstate Commerce Act).

<sup>5</sup> Section 11324(c) states that "[t]he Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities." (Emphasis added)

the Board shall, upon the request of the acquiring carrier, require the selling carrier to provide to the acquiring carrier trackage rights to allow a reasonable interchange with the selling carrier or to move power equipment or empty rolling stock between noncontiguous feeder lines.

By contrast, the statute governing the OFA process – 49 U.S.C. § 10904 – does not contain any similar provision authorizing the Board to impose ancillary trackage rights or access conditions in connection with an OFA.<sup>6</sup>

The ICC recognized that Congress's failure to provide explicit conditioning authority in connection with an OFA – particularly when contrasted with the express grant of such authority in connection with feeder line applications under Section 10907 – meant that the agency had no jurisdiction to grant ancillary trackage rights in connection with an OFA. In amending its feeder line regulations in 1983, the ICC observed that:

the feeder line provisions offer more benefits to the purchaser than 49 U.S.C. 10905 [now § 10903]. Under the feeder line statute, the Commission can require the selling carrier to provide the purchaser with trackage rights . . . . None of these advantages are available under 49 U.S.C. 10905.

*Feeder Railroad Development Program*, 48 Fed. Reg. 9649, 9650 (Mar. 8, 1983) (emphasis added). Several years later, in *Chicago & N.W. Transp. Co.—Abandonment Exemption—Mason*

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<sup>6</sup> The OFA statute does empower the Board to “establish the conditions and amount of compensation” for a sale in the event that an OFA purchaser and the incumbent railroad “fail to agree on the amount or terms of the subsidy or purchase.” See 49 U.S.C. § 10904(e). However, that language only gives the Board authority to decide disputes regarding the terms and conditions for the sale of the subject lines – it does not authorize the Board to grant trackage rights or access over other rail lines that are not included in the OFA. Congress could not have intended that a provision for settling disputes about the terms of a sale convey the type of conditioning authority that Congress granted in explicit language elsewhere in the Interstate Commerce Act. See *Whitman v. Amer. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

*City, IA*, ICC Docket No. AB-1 (Sub-No. 205X), 1987 WL 99927 (Nov. 20, 1987), the ICC held that:

Our examination of 49 U.S.C. 10905[now Section 10903] leads us to conclude that we cannot authorize trackage rights as part of a section 10905 transfer. There is no language in section 10905 specifically dealing with trackage rights. By contrast 49 U.S.C. 10910[now Section 10907] which also provides for forced sales to financially responsible persons, allows us, upon the offeror's request, to provide the "acquiring carrier trackage rights to allow a reasonable interchange with the selling carrier or to move power equipment or empty rolling stock between noncontiguous feeder lines operated by the acquiring carrier." 49 U.S.C. 10910(d). We must assume that if Congress wanted us to impose trackage rights in offer of financial assistance proceedings it would have provided us with specific language like that found in section 10910.

*Id.* at \*5 (emphasis added) (quoting *Conrail Abandonment of the Cairo Branch*, ICC Docket No. AB-167 (Sub-No. 56N) (Mar. 4, 1983)). *Mason City* and *Cairo* are just two examples of a significant body of precedent holding that the Board does not have jurisdiction to impose ancillary trackage rights conditions in connection with OFA proceedings. *See also Grand Trunk W. R.R. Co.—Abandonment—in Clark, Madison & Fayette Ctys., OH*, ICC Docket No. AB-31 (Sub-No. 29), 1990 WL 287573, at \*3 n. 2 (Mar. 23, 1990) ("[A] party cannot use the OFA procedures in 49 U.S.C. 10905 to acquire trackage rights."); *Delaware & Hudson Ry. Co. — Discontinuance of Trackage Rights Exemption—in Susquehanna Cty., PA et al.*, STB Docket No. AB-156 (Sub-No. 25X) (Mar. 30, 2005) ("Section 10904 is not a mechanism for attaining broader purposes using broader facilities than those proposed for abandonment or discontinuance.").

The Board itself recently confirmed that it does not have authority to impose trackage rights in connection with an OFA. *See Oregon Int'l Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific R.R., Inc.*, STB Fin. Docket

No. 35160, slip op. at 7 (Mar. 12, 2009) (“feeder line cases are different from OFAs because[] the agency can require the selling carrier to provide a feeder line purchaser with certain trackage rights”). Federal courts concur with the agency’s interpretation of Section 10904. *See Cisco Cooperative Grain Co. v. ICC*, 717 F.2d 401 (7th Cir. 1983). The *Cisco* court held that “[a] purchaser under Section 10905 . . . does not receive the same benefits as a purchaser under the feeder program. Under the feeder line statute, the Commission can require the selling carrier to provide the buyer with certain trackage rights and reasonable joint rates . . . . These benefits are not available to a purchaser under Section 10905.” *Id.* at 403-04 (emphasis added).

The *July 20 Decision* (at 3 and n. 5) acknowledges this longstanding interpretation of the Board’s authority under Section 10904. However, the Board poses the question whether, notwithstanding Congress’ unequivocal decision not to authorize the Board to award ancillary trackage rights in OFA proceedings pursuant to Section 10904, the Board might accomplish the same result by invoking other provisions of the statute. Specifically, the Board notes that Section 10903(e)(1)(B) grants it authority “to impose appropriate conditions on abandonment applications.” It also observes that Section 10903(d) “specifically requires the Board to consider the impact of abandonment on rural and community development.” *July 20 Decision* at 3. Neither of those provisions can reasonably be interpreted to convey authority to impose a trackage rights or access condition in connection with an OFA.

As an initial matter, neither Section 10903(e)(1)(B) nor Section 10903(d) is new to the Interstate Commerce Act – both of those provisions date from the Railroad Revitalization and Regulatory Reform Act of 1976 and have been in existence as long as the OFA provisions. *See* Pub. L. No. 94-210, § 802, 90 Stat. 31, 128 (1976). Therefore, all of the Board, ICC and federal court decisions holding that the Board does not have authority to impose trackage rights in

connection with an OFA were rendered at a time in which the language of 49 U.S.C.

§ 10903(e)(1)(B) regarding the Board's authority to impose conditions in connection with an abandonment was in existence (and, presumably, known to both the courts and the agency).

More fundamentally, the provisions of Section 10903 cited in the *July 20 Decision* apply to the Board's review of abandonment applications, not offers to purchase or subsidize a line authorized for abandonment (which are governed by a separate provision, Section 10904). Section 10903(e)(1)(B) allows the Board to "approve the [abandonment] application with modifications and require compliance with conditions that the Board finds are required by the public convenience and necessity." However, the very premise of an OFA (and the result of every consummated OFA transaction) is that the subject line is not abandoned. Indeed, the Board's regulations require that, once an OFA purchaser and carrier enter into an agreement for purchase of the line, "the Board will approve the [OFA] transaction and dismiss the application for abandonment or discontinuance." 49 C.F.R. § 1152.27(f)(2) (emphasis added).<sup>7</sup> Because Section 10903(e)(1)(B), by its terms, confers authority to impose conditions only in connection with a decision to "approve" an abandonment application – not the dismissal of such an application – the approval of an OFA under Section 10904 does not provide an occasion for the Board to exercise its Section 10903(e)(1)(B) conditioning authority.<sup>8</sup>

Nor does Section 10903(d)'s mandate that the Board consider rural and community impacts when reviewing an abandonment application change the jurisdictional calculus. In the

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<sup>7</sup> Where the person submitting an OFA offers to subsidize the line rather than purchase it, the Board postpones the effective date of its decision on the abandonment for as long as the subsidy agreement is in effect. *See* 49 C.F.R. § 1152.27(f)(1).

<sup>8</sup> Any interpretation of Section 10903 that would empower the Board to impose a general condition requiring an abandonment applicant to grant ancillary trackage rights to any party that might file an OFA, and that such a condition might survive dismissal of the abandonment proceeding, is untenable.

first place, Section 10903(d) does not itself contain any conditioning authority. Rather, Section 10903(d) simply identifies one factor that the Board must consider in determining whether to approve an abandonment application. Section 10903(d) does not expand or modify the scope of the Board's authority over OFAs under Section 10904.

In short, neither Section 10903(e)(1)(B) nor Section 10903(d) contains any language that would give the Board the authority – which Congress purposefully did not extend to the Board in Section 10904 – to impose a condition in an abandonment proceeding that grants a prospective OFA purchaser ancillary trackage rights or access rights over lines that are not included in the abandonment application or OFA. The fact that Congress explicitly gave the Board authority to grant such ancillary rights in the statute governing feeder line applications (Section 10907), but chose not to include similar language anywhere in Section 10903 or Section 10904, is powerful evidence that Congress' failure to do so was a deliberate legislative choice. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) ("it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of the statute but omits it in another").<sup>9</sup> Because the Board may exercise only that jurisdiction which Congress has granted to it, it may not impose trackage rights or other forms of access over ancillary lines as a "condition" upon its approval of an OFA (or of the abandonment application that gave rise to the OFA).

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<sup>9</sup> The agency's policy of strictly construing Section 10904 further supports the view that Congress' failure to include conditioning authority in that statute was purposeful. *See Chicago & N.W. Transp. Co.—Abandonment—in Oneida & Vilas Ctys., WI & Gogebic Cty., MI*, 363 I.C.C. 979, 980 (1981) ("We must strictly construe a statute such as this one which gives us the extraordinary authority to force a railroad to accept the compensation price we determined.").

## CONCLUSION

CP appreciates the opportunity to submit these comments regarding the Board's jurisdiction to impose ancillary trackage rights or access conditions in conjunction with the OFA filed by the State of Maine in this proceeding. For the above reasons, CP submits that such authority does not exist.

Respectfully submitted,

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Dated: August 3, 2010

### **CERTIFICATE OF SERVICE**

I hereby certify that I have caused a copy of the foregoing Comments of Canadian Pacific Railway Company to be served by first class mail, postage prepaid, this 3<sup>rd</sup> day of August 2010 to all parties of record.

/s/Terence M. Hynes  
Terence M. Hynes